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No. 71-1149

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 13–18) is not yet reported. The opinion of the Indian Claims Commission (Pet. App. 19–23) is reported at 23 Ind. Cl. Comm. 484.

JURISDICTION

The opinion of the Court of Claims was entered on December 10, 1971. The petition for a writ of certiorari was filed on March 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

463-876——72

QUESTIONS PRESENTED

Whether the Court of Claims correctly determined that its findings and decision in *Creek Nation* v. *United States,* 97 C. Cls. 602, certiorari denied, 318 U.S. 629, a suit brought under the Act of May 24, 1924, barred petitioner from putting the same facts in issue, seeking essentially the same relief which previously had been denied, in a case subsequently brought under the Indian Claims Commission Act.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 25 U.S.C. 70a, provides in pertinent part:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * * (3) claims which would result if * * * treaties, contracts, and agreements * * * were revised on the ground of fraud, duress, unconscionable consideration, * * * or any other ground cognizable by a court of equity; * * * (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *
>
> All claims [hereunder] may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States. * * *

STATEMENT

Under the Act of June 28, 1898, 30 Stat. 495, commonly known as the Curtis Act, and the Creek Agreement of March 1, 1901, 31 Stat. 861, certain lands of

the Creek Nation were to be allotted to its members and the remainder was to be sold. Among the lands to be sold were the lots in towns which had grown up within the Nation. The Act provided that commissioners were to be appointed who were to appraise the lots at their "true value." The town lots were appraised. The Indian Inspector and the Commissioner of Indian Affairs recommended that the appraisals be approved and they were approved by the Secretary of the Interior. *Creek Nation* v. *United States,* 97 C. Cls. 602, 606, certiorari denied, 318 U.S. 629; Pet. App. F, at 36–37. Thereafter they were sold.

Years later, pursuant to the special jurisdictional Act of May 24, 1924, 43 Stat. 139, the petitioner herein, the Creek Nation, alleging that the appraisals were too low and resulted from fraud or gross negligence on the part of the government, petitioned the Court of Claims "for the difference between the sale price of its town lots, which were sold by a commission appointed by the Secretary of the Interior, and what it alleges was the 'true value' thereof." *Creek Nation* v. *United States, supra,* at 607; Pet. App. F, at 38. The court received voluminous evidence and made numerous findings of fact, among which were (*id.* at 603–607; Pet. App. F, at 36–38):

> 7. The lots in the town of Wagoner were appraised in 1901, and all the rest in 1902, except the town of Boynton, which was appraised in 1905. Prior to the time the appraisals were made no lots within the Creek Domain had ever been sold, and no market values had been established. The commissioners in making the

appraisals visited each lot, noted its location and desirability, considered the condition of the country surrounding the town, the proximity of the town to railroads, and such other facts as might bear on the value of lots. In making the appraisals the commissioners exercised their best judgment of the value of each of the lots. In each instance the appraisals were unanimous, and in each instance the Indian Inspector and the Commissioner of Indian Affairs recommended that they be approved, and in each instance they were approved by the Secretary of the Interior.

After the appraisals had been made, deeds to the lots were executed by the Principal Chief of the Creek Nation. At the time these deeds were executed no one complained that the appraisals were too low.

8. * * * Later, on October 19, 1906, the Creek Nation presented a memorial to Congress complaining of wrongful scheduling of the lots, but in this memorial no complaint was made that they had been appraised too low. * * *

9. * * * The proof does not show that the lots were not appraised at their true values. * * *

The Court dismissed the petition, concluding (*id.* at 611; Pet. App. F, at 42):

> Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations. The proof offered by the plaintiff fails to convince us of either. * * *

In the instant case petitioner has sought the identical relief, on the basis of the "unconscionable con-

sideration" and "fair and honorable dealings" provisions (clauses (3) and (5), respectively) of Section 2 of the Indian Claims Commission Act. The government's contention before the Commission was that, as to the difference between the sale price of the lots and their "true value," the plaintiff was bound by the previous decisions of the Court of Claims in *Creek Nation* v. *United States*, 97 C. Cls. 602, certiorari denied, 318 U.S. 629 (Pet. App. F). The Commission rejected this defense on the ground that the two cases presented different ultimate legal issues.

On appeal by the government prior to a new valuation determination by the Commission, the Court of Claims reversed (Pet. App. A), holding that its previous findings as to the fair market value of the lots at the time of sale collaterally estopped petitioner from raising another claim predicated upon an alleged discrepancy between fair market value and sale price.

ARGUMENT

1. Petitioner contends (Pet. 10–12) that neither res judicata nor collateral estoppel may be asserted against claims under clause (5) of Section 2 of the Indian Claims Commission Act. But that Section expressly reserves to the United States all defenses other than those of limitations and laches (see p. 2, *supra*). Accordingly, the defense of res judicata has consistently been recognized as available, and has been upheld, in litigation involving claims under clause (5). *E.g.*, *Choctaw Nation* v. *United States*, 133 C. Cls. 207, certiorari denied, 352 U.S. 825; *Choctaw Nation* v. *United States*, 128 C. Cls. 195; *Western Cherokee*

Indians v. *United States*, 116 C. Cls. 665, certiorari denied, 340 U.S. 904. Cf. *United States* v. *Southern Ute Indians*, 402 U.S. 159.

The instant case is an example of the kind of repetitious litigation which the doctrines of res judicata and collateral estoppel are meant to forestall. Petitioner's basic claim has long been that the lots in question were appraised and sold at a price which was considerably less than fair market value. Petitioner was unable to establish this asserted fact in prior litigation, when the theory of recovery was that the alleged discrepancy between price and "true value" resulted from fraud or gross negligence (*Creek Nation* v. *United States*, 97 C. Cls. 602, certiorari denied, 318 U.S. 629; Pet. App. F); petitioner should not be entitled to a second "day in court" to try once again to establish the existence of the same alleged discrepancy in value as the basis for recovery under a differently articulated theory. This is especially so when it is recognized that petitioner's present theories of recovery ("unconscionable consideration" and failure to conduct "fair and honorable dealings") in essence simply restate the absence of full and fair consideration, *i.e.*, restate the factual issue which has already been tried. See generally, A.L.I. Restatement, *Judgments*, § 68. The court below, therefore, correctly determined that further litigation of the same issue was barred by the doctrine of collateral estoppel.

Indeed, the decision below is also justified on the ground of res judicata. Petitioner's claim under clause (3), relating to "fraud, duress, unconscionable consideration, * * * or any other ground cognizable

by a court of equity", is not functionally different from the claim previously advanced on the theory of fraud or gross negligence; it involves no fundamental issues of either law or fact which were not previously tried and thus it is barred. See A.L.I. Restatement, *Judgments*, § 48.

The doctrine of res judicata also bars the claim under clause (5), relating to "fair and honorable dealings that are not recognized by any existing rule of law or equity." As the court below stated in *Western Cherokee Indians* v. *United States*, *supra* (at 677–678):

> * * * it is clear from the history of the Act of 1946 that Congress did not intend to confer upon the Commission jurisdiction to permit claims * * * to be re-litigated under clause (5) * * *. * * * Clause (5) was intended, as its language clearly shows, when considered in the light of its history and other provisions of Section 2, to cover only moral claims * * * with respect to which no court had theretofore made a determination on the merits, or could have made such a determination under the terms of prior jurisdictional acts. * * *

In the previous litigation concerning petitioner's claim of unfair underpayment, principles of equity informed the court's construction of the statutory provisions authorizing the sale of the lots. 97 C. Cls. at 609; Pet. App. F, at 40. Petitioner's claim was given full consideration and determined on the merits. Relitigation of what is essentially the same claim under clause (5) is therefore barred by the doctrine of res judicata. A.L.I. Restatement, *Judgments*, § 63.

2. Petitioner contends (Pet. 9–10) that the decision below conflicts with *Creek Nation* v. *United States*, 168 C. Cls. 483, Pet. App. G, arguing that the latter case held that the doctrine of collateral estoppel does not apply to causes of action arising under clauses (3) and (5) of Section 2. However, that was not the holding of the earlier *Creek Nation* case. The court in that case simply decided that the issue there presented (the "subjective intention" of the Indians and the government with respect to an agreement) had not been tried previously and that there was therefore no basis for invoking the doctrine of collateral estoppel. In so deciding, the court explicitly recognized the availability generally of collateral estoppel as a defense to actions brought under clauses (3) and (5), stating (168 C. Cls. at 494, 495; Pet. App. G. 59, 60):

> [As to clause (3), a] fact once litigated and found is binding on the parties in a subsequent suit for revision of a treaty or agreement. * * *
>
> [As to clause (5), where] the facts found in the prior litigation show on their face that the dealings were fair and honorable under the circumstances and no new and substantial factual question on the issue is raised, the Commission can, of course, entertain a motion for summary judgment on behalf of the Government. * * *

Thus neither the holding nor the language of its earlier *Creek Nation* decision conflicts with the present opinion of the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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